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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 505th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 12 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 28

1. Mr. AZZIMAN (Morocco), having suggested that in the French version of the title of article 26 "offres" be changed to "plis", said he had misgivings about the provision in paragraph (1) that the opening of tenders should be exactly simultaneous with the deadline for the submission of tenders. He felt that it would be more reasonable to allow a certain lapse of time between the deadline for the submission of tenders and the opening of the envelopes.

2. The CHAIRMAN said that it was the deliberate intention of the authors of the draft Model Law not to allow any time between the submission deadline and the opening of tenders, so as to preclude opportunities for misconduct. Clearly, however, situations could arise that necessitated a certain lapse of time between the two.

3. Mr. WALSER (Observer for the World Bank), emphasizing the importance of simultaneity, said that the World Bank did not allow any time at all between the two and that he knew of no valid reason for acting otherwise. Even a very short interval could give rise to doubts concerning the submissions.

4. Mr. PRIESTLEY (Observer for Australia), drawing attention to the comments of the Australian Government contained in document A/CN.9/376, wondered whether paragraph (3) was not inconsistent with paragraph (3) of article 11, which admitted at least some circumstances in which tender prices would not be announced to those present at the opening of the tenders.

5. Mr. SAHAYDACHNY (Secretariat) said there did indeed appear to be an inconsistency between paragraph (3) of article 28 and paragraph (3) of article 11.

6. Mr. WALLACE (United States of America) and Mr. MORAN BOVIO (Spain) said that the observer for Australia had raised a very important point.

7. Mr. WALSER (Observer for the World Bank) said that, in his view, the tender prices ought to be read out at the opening of the tenders in order to preclude the possibility of different prices being announced later (which sometimes happened) and in the interests of transparency.

8. Mr. PRIESTLEY (Observer for Australia) said that, if it was considered essential that all tender prices be announced at the opening of the tenders, article 11 would have to be amended.

9. Mr. WALLACE (United States of America) expressed agreement with the observer for Australia.

10. The CHAIRMAN suggested that the Commission accept the principle of the prime importance of tender prices being announced at the opening of tenders and refer the matter to the drafting group, which could propose amendments to article 11 while the Commission adopted article 28 as it stood.

11. It was so decided.

Article 29

12. The CHAIRMAN drew attention to the Secretariat proposal, made in document A/CN.9/377, that the word "prompt" be inserted before "notice" in subparagraph (1) (b).

13. Ms. ZIMMERMAN (Canada), drawing attention to the Canadian Government's comments in document A/CN.9/376/Add.1, said that the first sentence of subparagraph (1) (b) made it mandatory for the procuring entity to correct "purely arithmetical errors apparent on the face of a tender". Her delegation considered that too great an onus was thereby placed on the procuring entity, which might become involved in disputes over whether or not an error was apparent on the face of the tender.

14. Accordingly, her delegation proposed either that the word "shall" be amended to "may" or, preferably, that the paragraph read "the procuring entity shall correct purely arithmetical errors that it may discover on the face of a tender".

15. Mr. WALLACE (United States of America) said that, in his view, the second proposed amendment would only slightly reduce the onus on the procuring entity.

16. He was opposed to replacing "shall" by "may", the first proposed amendment, since it ran counter to the purpose of subparagraph (1) (b), which was to prevent the procuring entity from rejecting a tender as unresponsive when it discovered purely arithmetical errors.

17. Mr. JAMES (United Kingdom) said he too was opposed to the replacement of "shall" by "may"; in his view, the rule must be mandatory.

18. As to the second proposal, he did not consider it unreasonable to require that the procuring entity correct purely arithmetical errors. Subparagraph (1) (b) should be left as it stood.

19. Ms. ZIMMERMAN (Canada) said that, with the present wording, if the procuring entity failed to discover an arithmetical error made by a tenderer it might become responsible for that error; tenderers should be responsible for getting their figures right.

20. Mr. MORAN BOVIO (Spain) said he would prefer the wording to remain unchanged.

21. Mr. LEVY (Canada) said that the Commission had to ensure a proper balance between the obligations of the procuring entity and those of the supplier or contractor. Clearly, if the procuring entity discovered an arithmetical error, it should correct it, but there was no reason why the procuring entity should be penalized for overlooking what the bidder had overlooked.

22. Ms. PIAGGI-VANOSSI (Argentina) said that, while she preferred subparagraph (1) (b) as it stood, she considered the second Canadian proposal acceptable; the procuring entity would not be required to make an exhaustive search for arithmetical errors - merely to correct those which were obvious.

23. Mr. GRUSSMANN (Austria), supporting the replacement of "shall" by "may", said that under Austria's procurement law the procuring entity could not correct arithmetical errors if they corresponded to more than 2 per cent of the estimated value of the contract. Reliability was considered important, and tenders which contained significant arithmetical errors were rejected.

24. Ms. CRISTEA (Observer for Romania) said that before correcting an arithmetical error the procuring entity would have to consult with the supplier or contractor that had made the error. That point should be reflected in the text.

25. Mr. WALLACE (United States of America) said that subparagraph (1) (b) should be read in the light of the draft Guide to Enactment (document A/CN.9/375) and in conjunction with subparagraph (3) (b), which permitted the supplier or contractor to withdraw his tender - possibly forfeiting his tender security - if he did not accept a correction of the mathematical error.

26. Mr. WALSER (Observer for the World Bank) said that obvious arithmetical errors had to be corrected and that article 29 as it stood was perfectly adequate for ensuring that they were.

27. Mr. JAMES (United Kingdom) said that, although - as stated earlier - he did not consider it unreasonable to require that the procuring entity correct purely arithmetical errors, he did not consider it the job of the procuring entity to inquire whether a supplier or contractor had meant to submit a different figure.

28. On the other hand, with regard to the words "errors that it may discover" in the second Canadian proposal, he pointed out that the procuring entity could easily claim that it had not noticed a particular error. Accordingly, he felt that subparagraph (1) (b) should be left as it stood.

29. Mr. WALLACE (United States of America) said that, while he would prefer subparagraph (1) (b) to remain unchanged, a formulation on the lines of "the procuring entity shall correct purely arithmetical errors which it discovers or reasonably might have discovered" would be an acceptable compromise in his opinion.

30. Mr. BARICAKO (Observer for the Organization of African Unity) said it was not legally sound to place on the procuring entity a duty which should lie with the supplier or contractor. Provision should therefore be made for the procuring entity to correct any errors which it might discover without any detraction from the responsibility of the supplier or contractor for ensuring the accuracy of the figures submitted.

31. Mr. LEVY (Canada), referring to the words "or reasonably might have discovered" suggested by the representative of the United States of America, said they could well result in recourse to a court or administrative

(Mr. Levy, Canada)

tribunal for a decision on what was "reasonable". In his delegation's opinion, subparagraph (1) (b) should provide for correction by the procuring entity of any arithmetical errors which it discovered, with no penalty if the procuring entity failed to discover all such errors.

32. Mr. PEREZNIETO CASTRO (Mexico) said that the problem appeared to affect only English-speaking, common law countries; the French and Spanish versions of subparagraph (1) (b) did not give rise to difficulties. The compromise suggestion made by the United States representative would reduce the onus on the procuring entity and should meet the concerns of common law countries. If it was accepted, the Commission's thinking could be reflected in the Guide to Enactment.

33. Mr. GRIFFITH (Observer for Australia) said that, in his opinion, the words suggested by the United States representative would increase rather than reduce the onus on the procuring authority.

34. His delegation preferred "may correct" to "shall correct", but otherwise felt that the present text was broadly suitable.

35. Mr. WALSER (Observer for the World Bank) said that, if the concern was for the procuring entity's responsibility, wording along the lines of "or reasonably might have discovered" was not very helpful. He suggested the following wording: "the procuring entity shall correct purely arithmetical errors which might be discovered during tender evaluation".

36. Mr. PHUA (Singapore) said the discussion seemed to be based on the premise that the procuring entity would discover the errors and, having discovered them, would know how to correct them.

37. He proposed that subparagraph (1) (b) start with the sentence "The procuring entity shall not reject a tender on the grounds that there are purely arithmetical errors apparent on the face of the tender". The present first sentence might then be amended to read as follows: "Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors apparent on the face of the tender that it discovers".

38. Mr. KOMAROV (Russian Federation), agreeing with the Canadian delegation that subparagraph (1) (b) placed too great an onus on the procuring entity, said that subparagraph (1) (a) provided the procuring entity with an opportunity to resolve a variety of problems - including, in his opinion, the problem of arithmetical errors. He therefore felt that subparagraph (1) (b) could simply be deleted.

39. Ms. ZHANG Yuejiao (China) suggested the wording "the procuring entity shall authorize the supplier or contractor to correct purely arithmetical errors", it being understood that the procuring entity would not be allowed to reject corrections made by the supplier or contractor.

40. The CHAIRMAN, emphasizing the need to strike a balance betweeen the responsibilities of the procuring entity and those of the supplier or contractor, asked whether the wording suggested by the observer for the World Bank was acceptable to the Commission.

41. Mr. GRIFFITH (Observer for Australia) wondered whether the drafting group could look at the possibility of using "are" in place of "might be" in the wording suggested by the observer for the World Bank.

42. Mr. LEVY (Canada) said he could accept the wording if "might be" was replaced by "are".

43. Mr. JAMES (United Kingdom) said that he was happy with "might be". There was a substantive difference between "might be" and "are", and the matter should not be left to the drafting group.

44. Mr. WALLACE (United States of America) regretted that the suggested wording did not include the phrase "on the face of a tender".

The meeting was suspended at 2.45 p.m. and resumed at 4.20 p.m.

45. The CHAIRMAN said that the following wording was now being proposed for subparagraph (1) (b): "Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors which are discovered on the face of a tender". He asked whether the Commission could accept that wording.

46. It was so decided.

47. The CHAIRMAN asked whether, since there had been no discussion of the Secretariat proposal that "prompt" be inserted before "notice" in the second sentence of subparagraph (1) (b), the proposal in question was acceptable to the Commission.

48. Ms. ZIMMERMANN (Canada) pointed out that there were a number of places in the Model Law where the procuring entity was required to "give notice" and that the question had not arisen of adding "prompt" in each such case.

49. Mr. GRIFFITH (Observer for Australia), pointing out that subparagraph (3) (b) enabled a supplier or contractor to accept or reject a correction, said it was important that the process be expedited. He therefore favoured insertion of the word "prompt".

50. The CHAIRMAN took it that the Commission wished to word "prompt" to be inserted.

51. It was so decided.

52. The CHAIRMAN asked whether the Commission accepted the text of paragraph (2) as drafted.

53. It was so decided.

54. Mr. ALSHTYWI (Observer for the Libyan Arab Jamihirya), pointing out that article 28 (2) referred to the representatives of suppliers or contractors, suggested that in subparagraph (3) (b) of article 29 the words "or a representative" be inserted after "supplier or contractor".

55. The CHAIRMAN said that, if that insertion were made in subparagraph (3) (b), similar insertions would have to be made elsewhere. References in the Model Law to suppliers or contractors were intended to include their representatives.

56. Mr. GRIFFITH (Observer for Australia) agreed; it was clear that a representative should be able to accept a correction under subparagraph (3) (b). Representatives could act for suppliers and contractors in all respects except the formal execution of a document, which might require sealing.

57. Mr. PEREZNIETO CASTRO (Mexico) said that in most States such questions were governed by laws not relating to procurement. The draft Model Law presupposed that suppliers and contractors would have representatives acting for them.

58. Mr. GRIFFITH (Observer for Australia) said that subparagraph (3) (b) seemed to give suppliers and contractors a choice of whether or not to accept a correction of an arithmetical error, although such errors were open to correction under subparagraph (1) (b). Noting that suppliers and contractors sometimes made deliberate arithmetical errors, he suggested that in order to prevent them from deriving an advantage from such errors, subparagraph (3) (b) be deleted.

59. Mr. WALLACE (United States of America) said that, as far as he could recall, it had been felt in the Working Group when drafting paragraph (3) that, for practical reasons, it would be better for the procuring entity simply to reject a tender containing a serious arithmetical error which the supplier or contractor would not allow to be corrected rather than to hold the supplier or contractor to that tender; if the supplier or contractor were held to the tender, the matter would almost certainly end in litigation.

60. Mr. MORAN BOVIO (Spain) said that there appeared to be a balance between subparagraph 1 (b) and subparagraph 3 (b) and that, if the latter subparagraph were deleted, the former one would have to be deleted also. To him it seemed obvious that, if a supplier or contractor refused to accept a correction of an arithmetical error made by the procuring entity pursuant to subparagraph (1) (b), the procuring entity should not accept the tender.

61. The CHAIRMAN took it that the Commission wished to retain subparagraph (3) (b).

62. It was so decided.

63. The CHAIRMAN, inviting the Commission to consider paragraph (4), drew attention to the Secretariat suggestion in document A/CN.9/377 that in subparagraph (4) (d) an express requirement that use of a margin of preference should be reflected in the record be added.

64. Mr. PRIESTLEY (Observer for Australia), having expressed support for the suggestion, said his delegation was concerned that the price factor should not be overemphasized. In document A/CN.9/376, commenting on article 28, his Government stated that the practice contemplated by paragraphs (2) and (3) of that article "places the emphasis on the price as being the main factor on which the contract is let, and thereby could be seen as giving the suppliers the wrong message. Modern practices try to achieve maximum value for money and price is only one of the factors considered." Commenting on article 29, his Government mentioned several other factors which were taken into account in evaluating tenders.

65. As pointed out in paragraph (3) of the commentary on article 29 in the draft Guide to Enactment (document A/CN.9/375), "in some tendering proceedings, the procuring entity may wish to select a tender not purely on the basis of the price factor". The Model Law accordingly enabled the procuring entity to select the "lowest evaluated tender", i.e. to select on the basis of criteria in addition to price. Subparagraphs (4) (c) (ii) and (iii) indicated the non-price criteria envisaged in the Model Law.

66. However, subparagraphs (4) (c) (ii) and (iii) did not adequately address his Government's concerns. For instance, in considering two tenderers which met the prequalification requirements and offered identical engineering skills and financial and personnel capabilities, the procuring entity might prefer the tenderer with previous experience of the particular type of work required. It was important to ensure that the procuring entity could select that tenderer, even where there was a price margin in favour of the less experienced tenderer.

67. He was not convinced that under subparagraphs (4) (c) (ii) and (iii) the procuring entity could. Nor was it clear from articles 6 and 21 that the procuring entity would have a sufficient margin of discretion in such cases. He therefore suggested amending subparagraph (4) (b) (i) to begin something like "the tender from that tenderer which has been determined to be fully capable of undertaking the contract and whose tender contains the lowest tender price ...". That amendment, if approved, would provide the necessary latitude for the procuring entity to disregard the lowest tender price if necessary.

68. Mr. WALLACE (United States of America) said that the Model Law had been drafted in such a way as to deal with the concerns of the Australian Government. First, formal tendering was only one of the methods open to procuring entities; the other methods, such as two-stage tendering, competitive negotiation and a request for proposals, allowed for consideration of a mixture of price and non-price factors. Secondly, even formal tendering offered a degree of latitude, because tenders were judged on the basis of qualification and responsiveness as well as of price.

The meeting rose at 5 p.m.